**Calendar No. 437**

| 101ST CONGRESS *2d Session* | SENATE | REPORT 101-240 |
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# CIVIL PENALTIES INFLATION ADJUSTMENT ACT OF 1989

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## REPORT

OF THE

## COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

## S. 535

## TO INCREASE CIVIL MONETARY PENALTIES BASED ON THE EFFECT OF INFLATION

JANUARY 31 (legislative day, JANUARY 23), 1990.—Ordered to be printed

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# CIVIL PENALTIES INFLATION ADJUSTMENT ACT OF 1989

JANUARY 31 (legislative day, JANUARY 23), 1990.—Ordered to be printed

Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

## REPORT

[To accompany S. 535]

The Committee on Governmental Affairs, to which was referred the bill (S. 535) to increase civil monetary penalties based on the effect of inflation, having considered the same, reports favorably thereon and recommends the bill do pass.

CONTENTS

| | Page |
|---|---|
| I. Summary and purpose | 1 |
| II. Background and need for legislation | 2 |
| III. Legislative history | 4 |
| IV. Section-by-section analysis | 6 |
| V. Estimated cost of legislation | 6 |
| VI. Regulatory impact of legislation | 7 |
| VII. Changes to existing law | 7 |

## I. SUMMARY AND PURPOSE

Civil monetary penalties are monetary fines assessed by federal agencies to deter violations of federal laws and regulations. S. 535, which would apply across the government, would establish a formula for adjusting civil monetary penalties (CMP's) to keep pace with inflation.

S. 535 would require the Administration to provide Congress once every five years with a complete list of all statutorily authorized civil monetary penalties, a calculation of the adjustment required for each penalty to keep pace with inflation, and a list of the statutory changes necessary to make these adjustments.

The bill would not provide for any automatic adjustment of the CMP's covered; separate legislation would be required for each

change. However, the bill would provide a benchmark against which the Congress could measure CMP's and ensure that appropriate adjustments are made. In addition, the listing of CMP's should help facilitate the consolidation and elimination of redundant and obsolete penalties by bringing such problems to the attention of Congress.

## II. BACKGROUND AND NEED FOR LEGISLATION

### *A. Civil monetary penalties*

Civil monetary penalties are used by federal agencies to enforce federal laws and regulations. These laws and regulations are designed to meet many important public needs, such as protecting the environment, ensuring a safe workplace, providing for transportation safety, and ensuring that consumers are protected from unsafe products.

Statutes containing civil monetary penalties are so dispersed throughout the United States Code that the Administration has been unable to state exactly how many there are.[1] By letter dated April 14, 1988, the Department of Justice provided the Subcommittee with a "quick and rudimentary survey" of statutory provisions making reference to civil monetary penalties. The list was 18 pages long and referenced 394 different statutory provisions.[2]

A more systematic study conducted by the President's Council on Integrity and Efficiency (PCIE) identified 200 different statutory civil monetary penalties authorizing agencies to levy 311 different penalty amounts for 251 types of violations. These penalties ranged from $10 to $1,000,000 in amount and covered violations in areas such as health and medical care, transportation safety, environmental hazards, customs, plant and animal protection, import/export restrictions, land and resource management, economic sanctions, and routine reporting requirements.[3]

The PCIE reported that 19 agencies for which data was available reported collecting a total of 186,902 CMP's in Fiscal Year 1987 and 876,373 CMP's over the last five years. The Report reached no conclusions as to the total dollar amount of CMP's collected.

### *B. The need for inflation adjustments*

S. 535 arises out of a concern that the deterrent effect of many CMP's has been weakened by years of inflation. Statistics provided to the Subcommittee by the PCIE indicate that many CMP's have not been adjusted in decades. According to the PCIE Report, 60 percent of all CMP's were last adjusted before 1981; 30 percent were last adjusted before 1961; and 16 percent were last adjusted before World War II. In fact, the PCIE reported, six CMP's have been the same since the turn of the century, and several date as far back as 1793.[4]

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[1] Testimony of Joseph Wright, Deputy Director, Office of Management and Budget, S. Hearing 100-619, Federal Civil Penalties Inflation Adjustment Act of 1987, Hearing before the Subcommittee on Oversight of Government Management (February 29, 1988) (hereafter, "Hearing Record) at 40.

[2] Hearing Record at 138-155.

[3] Civil Monetary Penalties, Final Report of the President's Council on Integrity and Efficiency (June 30, 1988) (Hereafter, "PCIE Report" at 4. A copy of the PCIE report is appended to this Report.

[4] PCIE Report at 6.

The PCIE Report indicates that inflation has eroded the value of CMP's set as recently as 1976 by over 100 percent and CMP's set prior to 1970 by more than 200 percent. The PCIE Report states that substantial increases would be necessary to adjust some CMP's for inflation and restore their deterrent value:

> Most of the largest increases in amounts are due to the large size or extreme age of the original CMP. For example, when 29 U.S.C. 216 (The Fair Labor Standards Act) is updated for inflation from its 1938 base year, it increases 726.2 percent from $1,000 to $8,262 ($8,000 after rounding). Older CMPs produce even greater increases. When the $5,000 CMP in 49 U.S.C. 11901(A) (Interstate Commerce Act) is adjusted from its base date of 1906, it increases to $59,439 ($60,000 when rounded).
>
> Although most CMPs have been updated since 1961, even many of these recent CMPs show large increases when adjusted for inflation. All CMPs established in or before 1970 have inflation adjustment rates of over 200 percent and CMPs established as recently as 1976 have rates over 100 percent. These high rates can lead to some substantial changes in CMP amounts. For example, the $10,000 CMP which was established in 1964 under 12 U.S.C. 1817(j) (Federal Reserve Act) would be increased to $37,581 ($40,000 after rounding), an increase of 275.8 percent. . . .
>
> [In the case of large] base CMPs . . . [e]ven a minor adjustment can result in a difference of tens of thousands of dollars. The most glaring example of this phenomenon is found in 15 U.S.C. 1398 (National Traffic and Motor Vehicle Safety Act). This 1974 statute set a maximum CMP for a series of violations of automobile standards at $800,000. When this amount is adjusted at the rate of 137.8 percent it creates an adjusted CMP of $1,902,041 ($2,000,000 when rounded). A less glaring, yet still significant, example is found in 7 U.S.C. 86(c) (U.S. Grain Standards Act). When this 1976 statute's $75,000 CMP is adjusted at the 105.1 percent rate, it becomes $153,829 (rounded to $150,000). While this is not an increase of the magnitude of the previous example, $75,000 is still a substantial increase for a 12-year old CMP.[5]

There are numerous other examples of important civil monetary penalties that have been eroded by inflation. For example, Public Citizen's Congress Watch reported at the Subcommittee's February 29, 1988, hearing that the following CMP's had been substantially eroded:

> *FIFRA*—The maximum penalty for each violation of pesticide registration and permit requirements has remained at $5,000 since FIFRA amendments were enacted in 1972. Due to inflation, that $5,000 is worth only 36 per-

[5] PCIE Report at 8-9.

cent of its original value ($1800 in today's dollars). Adjusted for inflation, the penalty would be $13,750.

*Consumer Product Safety Act.*—The maximum penalty for each violation of CPSA has remained unchanged at $2,000 since 1972; it is worth only $720 in today's dollars. Adjusted for inflation, the penalty would be $5,520. Also, in 1972, the CPSA set a maximum total penalty of $500,000, worth $180,000 today. If adjusted, the maximum total penalty would be $1.38 million.

*National Traffic and Motor Vehicle Safety Act.*—The act sets safety standards for the multibillion dollar automobile industry. In 1966, Congress established a civil penalty of $1,000 for each violation of the Act; the penalty is unchanged today. Inflation has reduced the penalty's value to 28 percent of its original worth, or $280. In 1974, the maximum total penalty for related violations of the Act was raised to its current $800,000—which is worth $336,000 today, or 42 percent of original value. Adjusted for inflation, these penalties would be $3,560 and $1,872,000 respectively.

*Occupational Safety and Health Act.*—When OSHA was passed in 1970, civil penalties were $1,000 per violation of workplace safety and health standards and $10,000 for failure to furnish a workplace free from serious health hazards; they remain the same today. Yet if these penalties were adjusted for inflation, they would be set at $2,970 and $29,700, respectively.[6]

## III. LEGISLATIVE HISTORY

### A. *The* 100TH CONGRESS

S. 1014, the Federal Civil Penalties Inflation Adjustment Act of 1987, was introduced by Senator Frank Lautenberg in the 100th Congress on April 10, 1987. As originally introduced, the bill provided for automatic annual increases of all CMP's pursuant to a notice published in the Federal Register, without the need for any amendment to the statutes establishing the penalties.

The Subcommittee held hearings on the bill on February 29, 1988, and heard testimony from Senator Lautenberg; Joe Wright, the Deputy Director of the Office of Management and Budget and Chairman of the President's Council on Integrity and Efficiency; Richard Kusserow, the Inspector General of the Department of Health and Human Services and the Vice Chairman of the PCIE; Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division, Department of Justice; Michael Waldman, Legislative Director, Public Citizen's Congress Watch; and Jim E. Lapping, Director, Safety and Health Building and Construction Trades Department, AFL-CIO. Additional comments were solicited in writing from other federal agencies and included in the hearing record.

The Administration witnesses testified in favor of the concept of inflation adjustment but raised concerns about the fairness and effectiveness of automatically raising CMP's pursuant to a notice in

[6] Hearing Record at 65–66.

the Federal Register. OMB and Justice also suggested that a clear definition of CMP's was needed and that annual adjustments were too frequent. These concerns were echoed by many of the federal agencies that commented on the bill in writing.

In response to these concerns, the Subcommittee substantially revised the bill. By far the most significant change to the original bill was the deletion of the automatic adjustment provision. Instead of requiring an automatic inflation adjustment published only in the Federal Register, the revised bill provides for the President to report to Congress every five years as to which penalties need to be adjusted, and by how much, to keep up with inflation, and requires separate legislative action for each adjustment.

Under the revised bill:

(1) A "civil" monetary penalty" is defined as a penalty for a specific monetary amount that is assessed or enforced by an agency pursuant to federal law in an administrative proceeding or a civil action in the Federal courts.

(2) There is no automatic, across-the-board adjustment of CMP's. Instead, separate legislative action is required to make each adjustment.

(3) Concerns about the excessive frequency of adjustments are addressed by requiring that adjustments be calculated and reported to Congress every five years, rather than every year.

The revised bill also responded to the comments of several Federal agencies by (a) providing for incremental rounding of CMP adjustments; and (b) exempting CMP's which are already subject to inflation adjustment or which do not have a specific monetary amount, a fixed range, or a ceiling.

On September 15, 1988, the Subcommittee approved Senator Levin's substitute amendment to S. 1014, as described above, by a 7 to 0 vote. By letter dated October 17, 1988, the Justice Department informed Senator Glenn that the Reagan Administration had no objection to the bill as amended. However, the full Committee did not have time to act on the bill before the end of the session.

*B. The 101st Congress*

S. 535, the Federal Civil Penalties Inflation Adjustment Act of 1989, which is identical to S. 1014, as amended, was introduced by Senators Lautenberg and Levin in the 101st Congress on March 8, 1989, and referred to the Committee on Governmental Affairs.

By letter dated August 22, 1989, the Justice Department advised the Subcommittee that it had no objection to S. 535. The Justice Department letter stated:

> The Department has reviewed the bill, which appears to be identical to a bill (S. 1014, as revised) that was the subject of an October 17, 1988, letter from Acting Assistant Attorney General Boyd to Chairman Glenn. In that letter, the Department expressed its appreciation of the consideration given by the Committee on Governmental Affairs to the Department's earlier expressed comments and concerns about the prior version of S. 1014. As the letter indicated, those comments and concerns were reflected in the changes made to S. 1014 since its introduction. In light of

these changes, the Department stated that it had no objection to S. 1014 as revised. Since S. 535 simply incorporates the provisions of that bill, we do not object to S. 535.

The letter also stated that the Department of the Treasury intended to provide the Subcommittee with comments on this bill. By letter dated September 19, 1989, the Treasury Department informed the Subcommittee that it had no objection to the bill.

S. 535 was polled out of the Subcommittee on Oversight of Government Management on October 13, 1989, by a unanimous 9 to 0 vote. The bill was considered by the full Governmental Affairs Committee at a November 17, 1989 mark-up, and was reported favorably by voice vote.

## IV. SECTION-BY-SECTION ANALYSIS

*S. 535 contains the following provisions*

Section 1 states the short title of the Act.

Section 2 provides the Findings and Purpose underlying the Act. The Section states that CMP's play an important role in deterring violations of law and that the deterrent effect of many CMP's has been substantially eroded by inflation. The purpose of the Act is to provide for regular inflation adjustments to CMP's and maintain their deterrent effect.

Section 3 provides definitions of "agency", "civil monetary penalty", and "Consumer Price Index".

Section 4 provides for Civil Monetary Penalty Inflation Adjustment Reports. These are reports submitted by the President to the Senate Governmental Affairs Committee and the Government Operations Committee of the House of Representatives every five years. The reports would be required to list each CMP, the adjustment that would be required to reflect inflation, and the legislative changes that would be necessary to make each adjustment.

Section 5 establishes the formula for making inflation adjustments to CMP's (using the Consumer Price Index), including the mechanism for rounding adjusted CMP's.

Section 6 requires an annual report to Congress on the number and amount of CMP's collected, together with recommendations for the elimination of obsolete CMP's or other appropriate legislation.

## V. ESTIMATED COST OF LEGISLATION

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, January 26, 1990.*

Hon. JOHN GLENN,
*Chairman, Committee on Governmental Affairs,*
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 535, the Federal Civil Penalties Inflation Adjustment Act of 1989, as ordered reported by the Senate Committee on Governmental Affairs on November 17, 1989. This bill declares that the deterrent effects of many civil monetary penalties have diminished over time as a result of inflation, and designs a mechanism by

which regular cost-of-living adjustments could be made to these penalties.

S. 535 would require the President to submit to the Congress, within six months of enactment of this bill and on January 1 of each fifth calendar year thereafter, a report on each civil monetary penalty levied by federal agencies and proposed cost-of-living adjustments in such penalties. In addition, the President would report annually on the number and amount of civil monetary penalties collected during the previous fiscal year and would recommend legislative modifications concerning civil monetary penalties. CBO expects that these requirements would not result in significant additional costs for federal agencies or affect the budgets of state or local governments.

Because this bill would not directly adjust civil monetary penalties for the effects of inflation, but rather, cost-of-living adjustments would be dependent on a separate piece of legislation, CBO estimates enactment of this bill would have no effect on federal revenues.

If you wish further details, please feel free to contact me or your staff may wish to contact Caroline Ratcliffe of the Tax Analysis Division at 226–2720.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

## VI. REGULATORY IMPACT OF LEGISLATION

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of S. 535. Because S. 535 does not require the issuance of any regulations and has no effect on private parties, the Committee has determined that it would have no regulatory impact.

## VII. CHANGES TO EXISTING LAW

Paragraph 12 of rule XXVI of the Standing Rules of the Senate requires a statement of changes in existing law made by the bill, as reported. Because S. 535 contains entirely new statutory provisions, which are not codified, it would make no changes to existing law.

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